THE KOWSHING, IN THE LIGHT OF INTERNATIONAL LAW.

In entering upon a discussion of this case the author of this thesis is not unaware of the presumption, arising out of his Japanese nationality, that his presentation of the facts and circumstances of the case may be lacking in impartiality. It is in view of this presumption that in the following statement of the case the author expressly refrains from making a single reference to the Japanese sources. From the reports[1] of the Captain and the chief officer of the *Kowshing* the following facts appear:

Nationality.—The *Kowshing* was a British steamer belonging to the Indo-Chinese Steam Navigation Co., an English corporation doing business in China.

Employment.—She was chartered by the Chinese Government to serve as a transport, and formed a part of the expedition of ten transports which carried troops from China to Korea. At the time she was sunk by the *Naniwa*, a Japanese man-of-war, she was actually engaged in carrying 1,100 Chinese soldiers, two Chinese generals, one European military director, a number of other officers, twelve guns, and rifles and ammunition proportionate to the number of soldiers.

Time and Place.—She was sighted by the *Naniwa* at about 9 A. M. on the 25th day of July, 1894, off the coast of Korea, and at about 2 P. M. she was finally sunk.

Circumstances.—The fact that the *Kowshing* was a British steamer was several times repeated to the Japanese, as was also the fact that at the time of her leaving port war had not been declared. In consequence of these remonstrances the *Naniwa* made many efforts to make the *Kowshing* follow her without the use of force. Failing in these peaceable efforts the *Naniwa* discharged a torpedo and also fired her guns, resulting in the sinking of the vessel.

The claim, made by the officers of the *Kowshing*, that at the time of her leaving port war had not been declared, was undoubtedly well-founded, but, at the same time, the important fact must not be lost sight of, that a state of war was actually existing at the time she was sighted. Witness the following

[1] Appendix A, Nos. 1 and 2.

extracts from Vladimir's[2] "China-Japan War": "On the 25th [July, 1894] at 7 A. M., when they [three Japanese men-of-war] were near the islands of Phung and Shapain, they met two Chinese men-of-war—the *Tsi-yuen* and the *Kwang-yi*. * * * The action was short and decisive. In about an hour the *Kwang-yi* was crippled, and had to be run into shallow water. The *Tsi-yuen* had her bow gun disabled, twenty of the crew were killed, etc., etc." Thus it appears that only a few hours before the *Kowshing* was sighted an actual war had broken out. The first question, then, of international law is: Did Japan act within the rules of international law in commencing a war without a formal declaration?

Roman Practice.—It is often asserted that the Romans never commenced a war without making a formal declaration, but no less a man than Lord Hale is the authority for saying that even with them the ceremony was frequently dispensed with, when, *e. g.*, delay might occasion surprisal or irreparable damage to the Commonwealth; as when the adverse party made preparation, which if not suddenly repressed, might prove more dangerous and irresistible. Commenting upon this Robert Ward, the historian of international law, says: "The soundness of this opinion depends upon no deep founded reasoning, no abstract propositions, no ingenious niceties. It is graven in the common sense, in the very instincts of mankind. For who, having proof that another had resolved to attack him in arms, and seeing him approach with arms in his hands, would not instantly disable him if he could, before his design was executed? Who that is told that another is seeking a sword to aim at his breast, will not be beforehand if he can, and seize the sword himself? In civil society, where threats of violence are used by an enemy, we have a right to demand security, and the judge must award it. Out of society there is no judge, and the man of nature is left to discretion. It is needless to remark that States, in this respect, are out of society."[3]

Modern Practice.—It will not be denied that it lies at the very conception of international law that it is a body of rules and practices set up by the civilized nations of the world, of their own free will and accord. What, then, has been the practice of modern civilized nations regarding this point?

[2] Vladimir is an Englishman who was connected with a diplomatic mission to Korea, and who, on account of his official position, prefers to write under this assumed name.

[3] Ward's "Enquiry."

Woolsey says that "the number of wars without declaration within the last three centuries is quite considerable," and, by way of illustration, mentions the war of Spain with the United Provinces, and that of Gustavus Adolphus with the Emperor Ferdinand II., as having been waged without being preceded by any formal declaration. Kent gives the following as instances in which no declaration preceded, viz.: 1. The war of 1756, between England and France; 2. The war of 1778, between England and France; 3. The war of 1793 between England and France; 4. The war of 1803, between England and France; 5. The war of 1812, between United States and England. Nor do the foregoing exhaust the list. Louis XIV. commenced the war of 1688 without making any formal declaration, and it was after he had marched to the Rhine, invested all, captured some, of the fortresses of the Palatine, that he published his manifesto of war. The war of the Spanish Succession was carried on for many months without any declaration. The bloody battle of Chiari, September 1, 1701, was fought nine months before declaration on one side and nearly a year on the other. The entire destruction by the English of the Spanish fleet at Passaro, August 11, 1718, took place without any formal declaration and was justified by England on the ground that the delay necessarily caused by such declaration would have enabled Spain to destroy the ally whom the English fleet was sent to protect. The war between France and Mexico in 1838 was begun by France instituting a blockade which Mexico considered an act of hostility. The war between the United States and Mexico in 1846 was begun without either notice or manifesto. These examples, which by no means exhaust the list, are sufficient to show that the uniform practice of modern nations has been to disregard the ancient custom of making a formal declaration before commencing hostilities. The explanation of this disuse is to be found, as suggested by Woolsey, in "the publicity and circulation of intelligence peculiar to modern times."

Authorities.—Passing from single instances of practice to conclusions reached by the writers on International law, it is found that there is a substantial agreement amongst them that a previous declaration is not necessary. Woolsey holds that war between independent sovereignties ought to be an avowed open way of obtaining justice, and reasons thus: "For every state has a right to know what its relations are towards those with whom it has been on terms of amity, etc., etc. It is necessary, therefore, that some act show in a way not to be mistaken that

a new state of things, a state of war, has begun."[4] It is evident from this reasoning of this great American publicist that the expression "an avowed open way" is here intended to have a broad meaning, including not only a formal declaration but also any communication that notifies the other state, in terms not to be misunderstood, that the amicable relation hitherto existing is at an end.

Phillimore goes farther than this. Shortly stated, his position is that it is sufficient if one state lets the other understand its belligerent intentions, no matter in what form it is done. Witness the following passage: "For what does the reason of the thing require as a preliminary to actual war? Not that the party compelled to seek redress should afford his enemy, the wrong-doer, an opportunity of strengthening himself in his injustice, and even taking the other supposition, that both parties conceived themselves to be fully in the right, no analogy of private jurisprudence suggests that the one party should concede to the other any advantage in the law suit, whether it be that of evading the tribunal or of mending his case; the truth is, that good faith and the general interest of the Society of States require that when one member of it is about to exchange friendly for belligerent relations with another, he should not do so until fair and reasonable notice of his relations has been communicated. The channel of communication is, after all, of little importance, whether it be through a demand accompanied by a direct intimation that upon its refusal recourse would be had to war; or whether that intimation may be indirectly suggested by the nature of the demand itself, and the surrounding circumstances of the case, among which circumstances considerable weight must be ascribed to the withdrawal of the ambassador."[5]

Bynkershoek, who devotes a whole chapter to the subject of Declaration, is conceded to be by far the greatest authority on the subject. It is, therefore, interesting to see that he holds that declaration is unnecessary; that a war may begin by mutual hostilities as well as by a declaration; that it is evident, that where there is no judge between the parties, as is the case with princes, everyone may retake that which belongs to him; that this being the case, everyone is at liberty to make or not, as he pleases, a declaration of war; that reason alone is the soul of the law of nations, and that taking reason for guide no argument can be found to prove the necessity of declaration, but many on

[4] Woolsey's "Introduction."

[5] Phillimore's International Law, Vol. III.

the contrary, to show that it is not necessary (Bynkershoek's Treatise on the Law of War, Chapter II.).

Lord Hale, the expositor of the Public Law of England, states that, according to that law, "A general war is of two kinds: 1. Bellum solemnitur denuntiatum; or 2, Bellum non solemnitur denuntiatum; the former sort of war is, when war is solemnly declared or proclaimed by one King against another Prince or state, etc., etc. * * * A war that is non solemnitur denuntiatum is, when two nations slip suddenly into a war without any solemnity, and this ordinarily happeneth among us; the Dutch war was a real war, and yet it began barely upon general letters of marque; again, if a foreign Prince invades our coasts or sets upon the King's navy at sea, hereupon a real, tho' not a solemn war may and hath formerly arisen, and therefore to prove a nation to be in enmity to England, or to prove a person to be an alien enemy, there is no necessity of showing any war proclaimed, but it may be averred, and so put upon trial by the country, whether there was a war or not, etc., etc."[6]

Hall, the English lawyer and publicist, whose recent death was lamented as a great loss to England and to the world, in his work on International Law takes the position that any sort of previous declaration is an empty formality unless an enemy must be given time and opportunity to put himself in a state of defense, conceding, of course, that no one has yet asserted such quixotism to be obligatory. After reviewing many authorities and precedents he concludes, that, when possible, some notice ought to be issued, for the convenience of neutrals, before commencing hostilities; that this cannot always be insisted upon inasmuch as there are cases when action, for example, on conditional orders to a general or admiral, takes place under such circumstances that a manifesto cannot be previously published (Hall, 315-322).

Vattel is often cited as an authority for insisting on Declaration before hostility, but even he, in so many words, says, that where delay would give the enemy time to prepare for defense, declaration may be dispensed with; that before declaration the enemy's frontiers may be reached, nay, his territory be entered and even his advantageous stations be occupied. Witness the following: "The law of nations does not impose the obligation of declaring war, for giving the enemy time to prepare itself for an unjust defense. The declaration need not be made till the army has reached the frontiers; it is even lawful to delay it till

[6] Hale's Pleas of the Crown.

we have entered the enemy's territory, and occupied an advantageous station; yet it must always precede the commission of any hostility."[7]

It is probable that the last clause above cited is construed to mean that a formal declaration must always precede war. But one who reads that clause with any degree of care can not fail to discover that it means no more than this—that even at that moment when you have occupied the enemy's advantageous positions and are ready to charge upon him, you must not forget what you are about; that even at that moment, if the enemy is willing to comply with your demands, you must refrain from fighting him; that to this end you must precede your hostile acts with a formal declaration, for you cannot tell but that that last moment may awaken your enemy to his sense. But if it does not, then you may charge upon him at once. Thus Vattel's position is defeated by his own reasoning; for what is the use of a declaration if you can be fighting your enemy at the same instant with it? Moreover, is it not always understood that the invading state must stop as soon as the offending state submits? The practical result of Vattel's reasoning also is that war may be waged without being preceded by a formal declaration.

But it is from Hugo Grotius that Vattel, Puffendorf and the rest who insist on Formal Declaration derive their authority. Hence it is that we must look to him for the true reason of what he and his disciples contend for. "The true reason is," says Grotius, "that the war might appear for certain to be the act of the people, or the rulers of the people, since there are peculiar rights of war, which have not place in hostilities against robbers, or revolted subjects." In other words, Grotius calls for undoubted evidence that the war proceeds from a sovereign power. That this condition is met when one government publishes a declaration against another, is not denied. But this is merely one mode of proof. There is at least one other mode of proof. This is when the Foreign Minister of one court and the Ambassador of another carry on a series of negotiations, which is finally brought to an unsatisfactory termination. That such was the case with the relations between Japan and China will be seen by referring to the nine official documents published by the Japanese Government.[8] Before concluding this review of the authorities, another reference may be made to the eminent English

[7] Vattel's International Law.

[8] Appendix B.

author, the historian of International law, to whom reference has already been made. The following two propositions are laid down by him as the result of the soundest opinions on the duty of nations about to assume the character of enemies:

I. When there are differences between states which cannot be composed, the sword shall not be drawn unless justice has been demanded and refused, or delayed so as to amount to a refusal, and unless there is a reasonable understanding between the parties, of the consequences of such refusal; but

II. The above proposition *cannot apply wherever an adversary, by threatening attitudes and dangerous provisions of hostilities, the causes of which he will not satisfactorily explain, has rendered the duties it contains unnecessary.*[9]

The result of the. foregoing review of precedents and authorities may be summarized as follows:

Declaration is a custom which has come down from one or two nations of antiquity—particularly the Romans. But the Romans themselves did not observe the custom when the principle of self-preservation was involved, as, for instance, when the enemy was getting ready for an attack and the delay caused by a declaration would have enabled him to do irreparable damage.

The modern nations of Europe, who have adopted many of the laws and customs of the Romans, and who for a long time had considered this particular custom of declaration as binding upon them simply for the reason that it had come from the Romans with other customs, have at last concluded that this is a custom altogether too antiquated for these modern times, and their almost uniform practice for the last two hundred years or so has been to disregard this custom of making a formal previous declaration.

All the writers consulted, except one, are agreed that the intention of belligerency must be communicated in some way. The only point on which they differ or can be said to differ is the form that the notice of belligerency should assume. Woolsey does not say what form it should assume, but rather intimates that any act is sufficient if its shows unmistakably the intention of belligerency. Phillimore expressly states that form is immaterial. Bynkershoek totally denies the necessity of a declaration. Lord Hale states that the Public law of England recognizes such a thing as a war without declaration. Hall characterizes a declaration as an empty formality. Vattel and Grotius, while insisting on a previous declaration, reduce their position to

[9] Ward's "Essays."

a mere nothing, the one by admitting that the ceremony may be immediately followed by hostilities, the other by saying that it is for no other purpose than evidence. Ward calls for a reasonable understanding between the parties as to the consequences of their disagreement, but he says that this duty is made unnecessary if the opposite party is already making warlike preparations the cause of which he will not explain.

Coming back to the question, "Did Japan act within the rules of International Law in commencing a war without a formal declaration?" the Romans would seem to say, "Yes; under some circumstances we have done so." The modern nations of Europe would seem to say, "Yes; that has been our uniform practice for over two hundred years." Bynhershoek, Hale, and Hall would seem to say, "Yes," absolutely. Vattel would seem to say, "Yes," in substance. Woolsey, Phillimore and Ward would seem to say, "Yes," with the proviso that the opposite party was sufficiently informed as to what the consequences of disagreement would be. To this Ward would seem to add, "This proviso, however, does not apply where the opposite party is already making warlike preparations against you." Grotius also would seem to say, "Yes," with the proviso that the opposite party had sufficient evidence that the war proceeded from Sovereignty.

The application of these principles to the case in question requires an examination fuller than that already made into the relations existing between Japan and China up to, and, at the time in question—namely, the morning of July 25th, 1894. It being the aim of the author that no *ex parte* account of facts shall be allowed to get into this thesis, he has elsewhere[10] appended the full text of the nine diplomatic documents that passed between Japan and China immediately preceding the outbreak of the war. As giving light on these documents it may also be well to recall at this point the provisions of the well-known Tien-tsin Treaty of 1885. It provided:

1. That the troops of Japan and China then in Korea should be withdrawn immediately.

2. That no more officers should be sent to Korea for military instruction by either Japan or China.

3. That if in future any disturbance of a grave nature should occur in Korea, necessitating the respective countries or either of them sending troops there, they should give each to the other previous notice in writing of their intention so to do, and after

[10]Appendix B.

the matter is settled they should withdraw their troops and not further station them there.

It is now proposed to examine the nine diplomatic documents above referred to.

No. I. is a strangely inconsistent document. With legal precision it states the reason why the notice is sent to Japan—that it is because by virtue of the Treaty of 1885 Japan and China stand on precisely the same footing in regard to their rights in Korea. Towards the close, however, it vaguely hints that Korea is a tributary state of China, by declaring that the sending of troops to Korea is in harmony with China's constant practice to protect her tributary states by sending troops to assist them. In No. II., dated the same day, Japan makes a prompt and explicit denial of this vague claim. In No. III., also dated the same day, Japan gives notice to China, that if China avails herself of her rights under the Treaty of 1885, Japan also intends to do the same. In No. IV. China makes another vague claim that Korea is her tributary state. She also declares that the sole object of he sending troops to Korea is the suppression of the Korean insurgents. (The importance of remembering this point will appear later.) She attempts also to limit the number of the Japanese troops, and to restrict their movements, in Korea. In No. V. Japan makes another plain denial that Korea is a tributary state of China. She declares also that she will use her own judgment in the exercise of her legitimate rights.

With No. VI. the correspondence assumes a new phase—Japan proposes the coöperation of the two countries, (1) in the suppression of the Korean insurgents, and (2) in the improvement of the Korean administration. No one who recalls the series of events that led to the conclusion of the Tientsin Treaty in 1885, can doubt the reasonableness of this proposal. China herself does not deny its reasonableness. She takes five days to find an excuse. At last she sends her reply. In this reply (No. VII.) she declares that the insurgents have already been suppressed and there is no necessity for the co-operation of the troops of the two countries in this matter; she rejects Japan's idea of instituting administrative reforms in Korea; she reminds Japan that in consequence of the suppression of the insurgents and by virtue of the binding force of the Tientsin Treaty the Japanese troops must be withdrawn at once; but she is silent as to the withdrawal of her own troops from Korea or as to the binding force of that treaty on herself.

In No. VIII. Japan disagrees with China, and declares that she will not withdraw her troops unless she is guaranteed that the insurgents have been fully suppressed and the cause of trouble eradicated. This disagreement is virtually the end of the series of negotiations. Between this document and the next there is an interval of twenty-three days, during which, it may be fairly inferred from No. IX., China persistently insists upon the withdrawal of the Japanese troops from Korea but does not withdraw her own. At last Japan sends the last of all communication from either side. In No. IX. Japan sets forth the unsatisfactory outcome of the negotiations and concludes that "the only conclusion deducible from these circumstances is that the Chinese Government are disposed to precipitate complications, and in this juncture the Imperial Japanese Government find themselves relieved of all responsibility for any eventuality that may, in future, arise out of the situation."

The foregoing examination of these documents shows—that China admitted that she stood on precisely the same footing with Japan in regard to her rights in Korea; that it was only in case a disturbance of a grave nature existed in Korea that she could send her troops there; that such disturbance did exist; that therefore she had sent her troops for the sole purpose of suppressing it. That Japan, upon receipt of China's notice, took no time in despatching her own troops to Korea, unwilling that the sad event of 1884 should be repeated; that she then proposed that Japan and China should unite in suppressing the insurgents and reforming the administration. That China rejected these proposals, and in so doing represented that the insurgents had been suppressed and demanded that Japan should withdraw her troops, at the same time keeping her own troops in Korea, notwithstanding her previous declaration that the sole object of the presence of her troops in Korea was the suppression of the insurgents. That Japan disagreed with China, refused to believe China's representation as long as it was contradicted by the latter's own conduct in not withdrawing the Chinese troops, and resolutely refused to withdraw her troops. That after this disagreement China again demanded, and Japan again refused, the withdrawal of the Japanese troops. That at last Japan gave notice to China that her conduct in rejecting Japan's proposals, and in demanding the withdrawal of the Japanese troops, without at the same time withdrawing her own, was such that Japan did not hesitate to suspect a disposition on the part of China to precipitate complications, and warned her, as plainly as diplo-

matic politeness would permit, that any further act in the same line would be met as an act of belligerency.

It was when matters stood at this stage that hostilities were commenced on July 25th, 1894, one of the incidents of which was the sinking of the *Kowshing*. Would not Woolsey, Phillimore, Ward and even Vattel, unite in saying that China was sufficiently informed as to what the consequences of despatching more troops to Korea (and be it always remembered that the *Kowshing* was carrying more than 1,100 soldiers to Korea) would be? Bearing in mind the warning given by Japan's Minister of Foreign Affairs, would not Grotius hold that China had sufficient evidence that the war proceeded from the Sovereign Power of Japan? Judging from their precedents, would not any nation of Europe have done the same under similar circumstances? Besides, even supposing for the sake of the argument, that China had no notice of Japan's intention, the *Kowshing*, with her cargo of officers, soldiers, and ammunition, would, if allowed to proceed, have enabled China to reënfore her forces in Korea to such an extent that she would have had little difficulty in driving all Japanese out of Korea. Was not this a case to which the second proposition of Ward applies? that notice need not be given where the opposite party is already making warlike preparations against you. Under such circumstances would not even the Romans have dispensed with the ceremony of declaration? China had officially declared that her sole purpose in sending troops to Korea was to suppress the insurgents. She had also officially declared that the disturbance no longer existed. She had also been officially warned that if, under the circumstances, she sent any more troops, Japan would regard the act as a belligerent one. Yet she refused to heed the warning. She sent more troops. She sent them for the unmistakable purpose of fighting Japan. Under these circumstances it will not be denied that Japan was acting within the rules of International Law in commencing hostilities in advance of a formal declaration.

But it is asserted that the *Kowshing* was a neutral vessel, entitled to the rights of a neutral, and, therefore, the sinking of her by the Japanese man-of-war was a gross violation of International law. The following is quoted from the *Law Review and Magazine* (London) as giving the strongest statement of that side: "The further question arises as to whether the action of the Japanese was not, in the absence of any intimation of a state of hostilities, a gross violation of neutral rights. It is quite clear in

these days that, as between the contending parties themselves, no formal declaration of war is necessary. As regards third parties, however, it is a well supported and altogether reasonable view that either some sort of clear notice should be given, in order to throw upon them the duties of neutrality; or at any rate that there should be proof that the existence of war *de facto* was so public and notorious as to be in fact known to the neutral. * * * To admit otherwise is to admit the extraordinary principle that a war between A and B may be legitimately commenced and declared by a sudden attack on C's property, in which A has a slight interest. But even apart from this fundamental violation of International Law, it was clearly the duty of the Japanese, under any circumstances, to conduct the *Kowshing* to the nearest Japanese port for adjudication by a Court of Prize. If such a taking of the *Kowshing* into a Japanese port was rendered impossible, owing to the opposition of the Chinese troops on board, the ship should have been captured in the usual way. It seems absurd to suppose that a fully-equipped man-of-war, with available consorts to support her, could not have taken possession of an unarmed merchant vessel without summarily blowing her out of the water" (by J. M. Gover, LL.D., editor Department International Law).

Thus Mr. Gover maintains that a neutral is entitled to notice before he can be charged with the duties of a neutral. But, as his countryman, Hall, says, this rule is at best a rule of convenience. Admitting, for the sake of the argument, that this rule of convenience applies in all cases, it is submitted that in the particular case under consideration there was a sufficient notice in the very nature of the transaction, which, on the part of the vessel, was nothing less than an undertaking to form a part of China's hostile expedition against Japan. The Japanese Commander did not act on "the extraordinary principle that a war between A and B may be legitimately commenced by a sudden attack on C's property, in which A has a slight interest." On the contrary, he acted on the very ordinary principle of self-preservation that in a war between A and B, C must not be permitted to resort to the mean trick of assisting A without divesting himself of his neutral rights. It shocks any ordinary man's conscience and utterly confounds his common sense to be told that in a war between A and B, C may come in and materially assist A against B and, when caught by B in that very act, claim to be absolved from all responsibility because he had all the while been flying his neutral flag. It is against this very abuse of neu-

trality and prostitution of neutral flag that Mr. Gover's own country has always protested in her wars with other nations. Mr. Gover thinks that if the opposition of the Chinese troops on board was such that it was impossible for the Japanese to take the *Kowshing* into the nearest Japanese port for adjudication, she "should have been captured in the usual way." What he means by "the usual way" it is difficult to know. From the context it would seem that he means that the officers and mariners of the Japanese man-of-war ought to have put the Chinese officers and soldiers under chains. But he ought to remember that the crew of the Japanese man-of-war did not at most exceed four hundred, whereas the *Kowshing* carried nearly twelve hundred armed officers and soldiers. He also thinks it absurd that a man-of-war could not have taken possession of a transport without blowing her out of the water. This sort of argument is, to say the least, misleading. It proceeds on the assumption that a man-of-war is superior in strength to a transport, and also on the assumption that the opposite party is sufficiently intelligent to know this superiority and wherein it consists. Now, it is a fact beyond all question, as appears from the official reports[11] elsewhere appended, that the Chinese on board the *Kowshing* were absolutely ignorant as to the superior strength of the man-of-war over the transport, and repeatedly declared to the captain and other officers of the *Kowshing* that they were ready to fight with the Japanese. It is very probable that Mr. Gover based his argument upon the false assumption that those Chinese were as intelligent a set of men as himself. Hence, his argument fails. The foregoing quotation from no less a source than the editor of the Department of International Law of a leading English law review, shows how easy it is for one to have Reason overpowered by Sentiment. It has been seen elsewhere that the *Kowshing* was a part of a fleet of ten transports,[12] carrying in all an extraordinarily large number of troops from China to Korea, and was herself actually carrying about twelve hundred Chinese soldiers. The next question of international law, therefore, is:

Did the Japanese Commander act within the rules of International Law in destroying a neutral vessel in the transport service of the enemy and forming a part of his hostile expedition?

Authorities.—Woolsey says that "the conveyance of troops for a belligerent has long been regarded as highly criminal," and mentions many treaties in which exceptions are made

[11] Appendix A., Nos. 1 and 2.

[12] Chief Officer Tamplin's Report.

against free ships when they carry military persons. He says troops "are something more than contraband, as connecting the neutral more closely with the enemy," and reasons that if the obligations of neutrality forbid the conveyance of contraband goods to the enemy, still more do they forbid the neutral to forward the enemy's troops. For " a contraband trade may be only a continuation of one which was legitimate in peace, but it will rarely happen that a neutral undertakes in time of peace to send troops of war to another nation." As showing the rigor of the English courts on this subject, he cites a modern case, in which a Bremen ship was condemned during the Crimean Law, by a prize court at Hong Kong, for carrying two hundred and seventy ship-wrecked Russian officers and seamen from a Japanese to a Russian port.

Phillimore is no less clear than Woolsey, as appears from the following: "As to the carrying of military persons in the employ of a belligerent, or being in any way engaged in his transport service, it has been most solemnly decided by the Tribunals of International Law, both in England and the United States of North America, that these are acts of hostility on the part of the neutral which subject the vehicle in which the persons are conveyed to confiscation at the hands of the belligerent. * * * It has been justly holden that a ship so employed cannot escape confiscation by alleging that she acted under duress and violence. If an act of force, exercised by one belligerent power on a neutral ship or person, were to be deemed as sufficient justification for any act done by him contrary to the known duties of a neutral character, the rights of the belligerent and the rules of international law would be easily evaded and set at naught. The neutral must look to his own Government for redress against the Government which has coerced him. Moreover, the penal liability of the ship so employed is not extinguished until the vessel has shaken off the belligerent character which her occupation has impressed upon her. So long as she continues under the command of the enemy she remains liable to capture and condemnation."

Wheaton evidently does not wish to say what his countryman Woolsey plainly says, that military persons are something more than contraband articles. He admits, however, that they are analogous to contraband goods, and expresses himself thus: "A neutral vessel which is used as a transport for the enemy's forces is subject to confiscation, if captured by the opposite

belligerent. Nor will the fact of her having been impressed by violence into the enemy's service, exempt her."[13]

Hall, in his usual cautious, yet luminous, style, says: "A neutral vessel becomes liable to the penalty appropriate to the carriage of persons in the service of a belligerent, either when the latter has so hired it that it has become a transport in his service and that he has entire control over it, or when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war." Opinions to the same effect might be added almost indefinitely, but enough have been quoted to show that there is a remarkable unanimity among the authorities in holding that a neutral vessel cannot enter the transport service of one belligerent without at the same time making herself liable to the other. Nor are these opinions unsupported by adjudged cases. It is now proposed to examine these cases.

Adjudications:

The *Eliza Anne* was the case of an American ship laden with hemp, iron, and other articles, seized by the English within the territorial jurisdiction of Sweden, upon the outbreak of the war of 1812, and brought in for adjudication in the High Court of Admiralty of England. Among other things, the Court said: "The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending parties in which the essence of neutrality consists. * * * A war may exist without declaration on either side."[14]

The *Orozembo* was an American ship ostensibly chartered by a merchant in Lisbon (a neutral port) to proceed to Macao (also a neutral port), carrying on board three officers of distinction in the Dutch army, whose real intention was to reach Batavia (a Dutch colony). The claimant contended that with respect to the secret destination and intention of particular persons on board, in the character of passengers, it was impossible for the master to conjecture, much less to know, the purposes for which they were going, beyond what they might think proper to disclose, that the ship's undertaking was a transaction of a commercial nature in its principal features; that the military persons were few in number, not taken on board in their military character, and destined, on this immediate voyage, to a neutral

[13] Wheaton's International Law.

[14] 1 Dodson's Admiralty Rep. 247.

country. But the court held: That a vessel hired by the enemy for the conveyance of military persons is to be considered as a transport, subject to condemnation; that number alone is an insignificant circumstance in the considerations on which the principle of law on this subject is built, since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition, and that the master's ignorance of the character of the service on which he was engaged could afford no ground of exculpation in favor of the owner.[15]

The *Friendship* was an American vessel apparently engaged in commerce, carrying thirty tons of fustic and forty-four hundred and fourteen hogsheads staves, but also carrying ninety passengers who were French mariners. After stating the suspicious circumstances of the case the English High Court of Admiralty said: "Under these circumstances I [Sir W. Scott] am of opinion, that this vessel is to be considered as a French transport. * * * What are arms and ammunition in comparison with men, who may be going to be conveyed, perhaps, to renew their activity on our shores? They are persons in a military capacity, who could not have made their escape in a vessel of their own country. Can it be allowed that neutral vessels shall be at liberty to step in and make themselves a vehicle for the liberation of such persons, whom the chance of war has made, in some measure, prisoners in a distant part of their own colonies in the West Indies? * * * I do with perfect satisfaction of mind, pronounce this to be a case of a ship engaged in a cause of trade, which cannot be considered to be permitted to neutral vessels, and without hesitation, pronounce this vessel subject to condemnation."[16]

The *Carolina* was a Swedish ship, which had served in the French expedition to Alexandria, as a transport to convey French troops. At the taking of Alexandria by the English this vessel was captured, but, before she had been brought to adjudication and while in the possession of the captors, she was lost. The case was heard in the English High Court of Admiralty, on a petition by the master that the captors be made answerable to him for the loss. It was contended on his part that he was an involuntary agent in the transaction, the French having compelled him, under an act of duress, to submit the vessel to their service. On this point the Court said: "If an act of force,

[15] The Orozembo, 6 Robinson's Admiralty Report 433.

[16] The Friendship, 6 Rob. 422.

exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demand must seek redress against the Government that imposed the restraint upon him. * * * Whether the troops were received on board voluntarily or involuntarily could make no difference."[17]

It was also contended on the master's part that it was an additional circumstance to be urged against the captors, as a reason why the loss should fall on them, that they stripped the vessel of her crew, and put other hands on board, and did not proceed to bring the vessel to adjudication immediately. On this point the Court said: "It must be conceded that commanders acting in the management of great expeditions cannot be tied down exactly to the same rules, by which individual cruisers are directed to proceed."[18] The principles set forth in the foregoing cases have been adopted by the Supreme Court of the United States, in many cases.

In the case of the *Commercen*, a Swedish vessel, captured by an American armed schooner, Mr. Justice Story said: "It has been solemnly adjudged that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employ, are acts of hostility which subject the property to confiscation. * * * The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile state, and assist in warding off the pressure of the war, or in favoring its offensive projects."

In the case of *The Nereide*, a neutral vessel carrying enemy's cargo and sailing under neutral convoy, Mr. Justice Story said: "It is a clear maxim of international law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporates himself into the measure or policy of either, if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character. * * * The act of sailing under belligerent or neutral convoy is of itself a violation of neutrality, and the ship and cargo if caught *in delicto* are justly confiscable, etc., etc."

The foregoing examination of the opinions of the most emi-

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[17] The Carolina, 4 Rob. 256.

[18] The Carolina, 4 Rob. 256.

nent publicists and also of regularly adjudged cases, establishes the following:

That a neutral who would claim the benefit of his neutral character must act with perfect impartiality toward both the belligerent parties; that the conveyance of a certain class of articles for the benefit of one belligerent is such an offense as to forfeit his neutral character; that it is a much more serious offense, nay, "a highly criminal" conduct, for a neutral to engage in the transportation of troops; that if caught in the act, it is of no avail to the neutral to plead that he was acting under duress or was ignorant of the purpose of the belligerent whom he was serving; that if a neutral vessel, caught in the act of such hostile service, is lost while in the possession of the captors, the owner of such vessel can obtain no relief from *the belligerent whom he has been wronging;* that this is so even where it can be charged against the captors that they did not proceed to adjudication immediately; that this rule is founded upon the ground that the commander of a fleet has the discretionary power to decide for himself whether he shall attend to the interest of a wrongful neutral vessel first or postpone it till the greater interest of his own fleet has been attended to.

Applying these principles to the case under consideration, it cannot be denied that the *Kowshing* was a neutral vessel that had forfeited all her neutral rights by having acted contrary to the fundamental rules of the Law of Nations. She was a neutral vessel identified with the enemy, and as such she was no more entitled to protection than an enemy's vessel. If she had been caught singly while engaged in the ordinary duties of a transport, she could and should have been brought in for adjudication by a Japanese Court of Prizes. Even in that case, however, the Japanese commander would not have been bound to have brought her in immediately, but he could have attended to his more important duties. If, in the meantime, the vessel, after being stripped of its crew, should have been lost, the Japanese commander would not have been liable to the owner for the loss. If, as was the fact, the *Kowshing* was a part of a hostile expedition, her flying the British flag could have made no difference and the Japanese were entitled to prevent her by all means from reaching her destination. If, as was the fact, the number of Chinese soldiers on board was such as to greatly outnumber the Japanese; if, as was the fact, the Chinese soldiers on board of her were such an ignorant set of men as not to believe, though told, that, however large their own number, the mechan-

ical superiority of a man-of-war over an unarmed transport was such, that they were completely in the hands of the Japanese, and if, as was the fact, owing to these circumstances, it was absolutely impossible for the Japanese commander to prevent these Chinese from reaching their destination (to the great disadvantage and perhaps utter defeat of the Japanese in Korea) without destroying a vessel, which, by reason of having acted contrary to the Law of Nations, had made itself confiscable to the Japanese; it cannot be denied that the Japanese commander was acting within the rules of international law, when he threatened the *Kowshing* with destruction in case of disobedience to his orders and did destroy her in consequence of such disobedience. It is alleged that at the time of her leaving port the *Kowshing* was without notice. But, was she not chartered by a military commission of the Chinese Government and placed under its sole control? Do not the reports of her master and chief officer show that they knew that she was a part of a fleet of ten vessels, chartered by the Chinese Government for the purpose of conveying reënforcements to the Chinese forces in Korea? Was she not caught in the very act of carrying a part of these reinforcements? In the face of these circumstances, can it be said that she was without any notice whatever? It may be contended that these circumstances merely constituted a case of presumptive notice. Be it as it may, at any rate the *Kowshing* had actual notice of the existence of a war, from the moment when she received the orders of the Japanese commander. If after receiving such orders accompanied by a due warning, she did not obey them, it can not be complained that the Japanese commander did execute his orders by means of force, the only alternative possible under the circumstances. It is also alleged that in disobeying the orders of the Japanese commander the officers of the *Kowshing* were acting under duress of the Chinese generals on board, but that such defenses do not avail in case of this kind has too often been decided to need any discussion at this point (*The Carolina*, ante.).

In conclusion the author ventures to hope, that, imperfect as this inquiry has been, the intrinsic nature of the case is such that he has not been altogether unsuccessful in showing that the many charges made against the so-called "Japanese barbarities," "ignorance of International Law," etc., etc., were, in this case, as in other cases, utterly without foundation. He may also be pardoned to hope that the *Kowshing* incident may serve in the future as a warning to that class of European adventurers who

have heretofore been in the habit of thinking that with the Orientals they may deal as they please simply because the guns of their nations will always protect them!

Tokichi Masao.

NOTE.—For lack of space the reports of the master and chief officer of the *Kowshing* and the nine official documents which passed between Japan and China, referred to in this thesis, have been omitted. Those who may wish to consult these will find them in the October Numbers of the *Japan Mail*, [Yokohama, 1894], and also in the Appendices of Vladimir's "Japan-China War."—*Ed.*